Farlim Properties Sdn Bhd v Goh Keat Poh & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–3–7 OF 1996
ZALEHA ZAHARI J
14 MAY 2002

Civil Procedure *— Res judicata — Estoppel — Application for removal of caveat — Whether earlier Federal Court decision and Court of Appeal decision had decided with precision the point in issue in the present suit — Whether present court should exercise its inherent jurisdiction in striking out — Rules of the High Court 1980 O 18 r 19*

In 1949, the lands in issue ('the said lands') were registered in the name of Choong Lye Hock Estate Sdn Bhd ('CLHE') as proprietor. It was then held, as to 25% of the said lands, for itself, and in respect of the balance 75%, for the estate of the deceased Chor Bah Say ('the deceased'). In the events that transpired only two of the beneficiaries remained as direct beneficiaries ('the two direct beneficiaries') of the deceased's estate. The majority of the deceased's beneficiaries died resulting in their estate (ie the first to sixth defendants in this case) becoming the beneficiaries of the deceased's estate. In 1991, Farlim was desirous of purchasing the said lands from the beneficiaries of the deceased's estate. The two direct beneficiaries however refused to execute the sale and purchase sgreement with Farlim and filed a caveat against the whole of the said lands. On the part of CHLE and the other beneficiaries, two sale and purchase agreements ('the 1992 Agreements') were executed between the CHLE and all but the two direct beneficiaries. Following the execution of the 1992 Agreements, Farlim applied to remove the caveat lodged by the two direct beneficiaries. Farlim contended that, as purchasers of the said lands and by virtue of the 1992 Agreements, they were 'persons aggrieved' within the meaning of s 327 of the National Land Code 1965 ('the NLC') and had the locus standi to apply for the removal of the caveat lodged by the two direct beneficiaries. Farlim's application was allowed by the High Court. On appeal, the Federal Court allowed the appeal (*Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188). In 1995, CLHE and the beneficiaries who executed the 1992 Agreements terminated the 1992 Agreements allegedly on the ground of Farlim's failure to furnish the bank guarantees stipulated therein. Thereafter, the first to sixth defendant entered into a sale and purchase agreement ('the 1995 Agreement') with the seventh defendant, GISB, in respect of their respective undivided share of the said lands. According to GISB, prior to and at the time of signing the 1995 Agreement with the first to sixth defendant, they had conducted a search at the land office, which revealed that Farlim had not entered any private caveat on the said lands. Following the execution of the 1995 Agreement, GISB entered a caveat on the said lands. The said lands were (except in respect of the fifth defendant share) subsequently registered in the name of GISB. Farlim challenged the termination of the 1992 Agreement by the defendant beneficiaries and the subsequent sale of the said lands by them to GISB. Farlim sought

for a declaration that the 1992 Agreements were still valid and subsisting as well as for other consequential relief, and for a further order that the GISB and the defendant beneficiaries be injuncted and restrained from transferring, assigning, charging, leasing or entering into or effecting any dealing in respect of the defendant beneficiaries undivided share in the said lands ('the 1995 OS'). Thereafter, Farlim filed this suit by which they sought for an injunction to restrain the first to sixth defendants and GISB from executing, transferring, assigning, charging and dealing with the said lands pending the disposal of the 1995 OS. In this action Farlim also sought for an order that the transfer of the said lands to GISB be set aside as well as for an order of specific performance of the 1992 Agreements contending that the first to sixth defendants were in breach of the 1992 Agreements and that the 1992 Agreements had not been terminated but were still subsisting and capable of performance. Farlim obtained an ex parte injunction in this action. On appeal to the Court of Appeal, this injunction was dissolved by the Court of Appeal as reported in *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd* [1997] 3 MLJ 90. GISB and the defendants applied to strike out the instant suit, but their application were dismissed by the senior assistant registrar. They appealed. The principle issue for determination in the instant court was whether the Federal Court decision and the Court of Appeal decisions had decided with precision the point in issue in the present suit, ie the validity of the 1992 Agreements.

Held, allowing the appeal:

(1) After carefully scrutinizing the fundamental and collateral issues in the judgment of the Federal Court and the judgment of the Court of Appeal, the court is of the opinion, that as for the judgment of the Federal Court, in deciding the issue whether Farlim was a person aggrieved within the meaning of s 327 of the NLC and whether they could apply for the removal of a caveat, the Federal Court did go into the issue of the validity of the 1992 Agreements. The capacity of the beneficiaries to enter into the sale and purchase agreements was taken as an important issue by the Federal Court. The Federal Court then made an unequivocal finding that the 1992 Agreements were unenforceable and void because the beneficiaries could not have consented to sell what they did not have. The pronouncement by the Federal Court constitutes a binding precedent constituting issue estoppel precluding Farlim from questioning the validity of the 1992 Agreements and binding all parties upon whom they were pronounced. Admittedly the first to sixth defendants were not parties to the Federal Court case. However the subject matter of the Federal Court case and the instant case were the same and the plaintiff was therefore bound by the findings of the Federal Court (see p 184A–E).

(2) Likewise, the Court of Appeal's judgment in dissolving the injunction must necessarily be construed to have considered the question of whether the issues raised, ie whether the 1992 Agreements were valid and whether the 1992 Agreements had been validly terminated constituted serious question to be tried. The respective sale and purchase agreements between the beneficiary defendants and GISB were clearly discussed in the Court of Appeal judgment. By dissolving the injunction the Court of Appeal clearly found that there were no issues to be tried (see p 184E–G).

(3) This case was an abuse of the process of court and Farlim should be precluded from reagitating the same matter which had been finally adjudicated by the Federal Court and the Court of Appeal. Their pronouncements on the issue of the validity of the 1992 Agreements are final and conclusive (see p 184H–I).

[Bahasa Malaysia summary

Pada 1949, tanah-tanah yang menjadi isu ('tanah-tanah tersebut') telah didaftarkan atas nama Choong Lye Hock Estate Sdn Bhd ('CLHE') sebagai tuanpunya. Ianya telah kemudian diputuskan, berhubung dengan 25% dari tanah-tanah tersebut, untuk dirinya sendiri, dan berhubung dengan baki 75%, untuk hartanah si mati Chor Bah Say ('si mati'). Dalam peristiwa-peristiwa yang berlalu hanya dua benefisiari kekal sebagai benefisiari-benefisiari langsung ('dua benefisiari-benefisiari langsung tersebut') bagi harta pesaka si mati. Majoriti dari benefisiari-benefisiari si mati telah mati yang menyebabkan harta pesaka mereka (iaitu defendan-defendan pertama hingga ke-enam dalam keadaan ini) menjadi benefisiari-benefisiari harta pesaka si mati. Pada tahun 1991, Farlim ingin membeli tanah-tanah tersebut daripada benefisiari-benefisiari harta pesaka si mati. Kedua-dua benefisiari-benefisiari langsung tersebut walau bagaimanapun enggan untuk menyempurnakan perjanjian jualbeli dengan Farlim dan telah memfailkan satu kaveat terhadap keseluruhan tanah-tanah tersebut. Di pihak CHLE dan benefisiari-benefisiari lain, dua perjanjian jual beli ('Perjanjian-Perjanjian 1992') telah disempurnakan antara CHLE dan kesemuanya melainkan kedua-dua benefisiari-benefisiari langsung tersebut. Berikutan dengan penyempurnaan Perjanjanjian-Perjanjian 1992, Farlim telah memohon untuk membatalkan kaveat yang diserahsimpan oleh kedua-dua benefisiari-benefisiari langsung tersebut. Farlim menegaskan bahawa, sebagai pembeli-pembeli tanah-tanah tersebut dan menurut Perjanjian-Perjanjian 1992, mereka adalah 'persons aggrieved' di dalam lingkungan maksud s 327 Kanun Tanah Negara 1965 ('KTN') dan mempunyai locus standi untuk memohon bagi pembatalan kaveat yang diserahsimpan oleh kedua-dua benefisiari-benefisiari langsung tersebut. Permohonan Farlim telah dibenarkan oleh Mahkamah Tinggi. Atas rayuan, Mahkamah Persekutuan telah

membenarkan rayuan tersebut (*Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188). Pada 1995, CLHE dan benefisiari-benefisiari tersebut yang telah menyempurnakan Perjanjian-Perjanjian 1992 tersebut telah menamatkan Perjanjian-Perjanjian 1992 tersebut yang didakwa atas kegagalan Farlim untuk memberikan gerenti-gerenti bank yang ditetapkan di dalamnya. Selepas itu, defendan-defendan pertama hingga ke-6 telah memasuki satu perjanjian jual beli ('Perjanjian 1995') dengan defendan ketujuh, GISB, berhubung dengan bahagian tidak berbahagi mereka masing-masingnya bagi tanah-tanah tersebut. Menurut GISB, sebelum dan pada waktu menandatangani Perjanjian 1995 dengan defendan-defendan pertama hingga ke-enam, mereka telah menjalankan satu carian di pejabat tanah, yang mana telah mendedahkan bahawa Farlim telah tidak memasukkan sebarang kaveat persendirian ke atas tanah-tanah tersebut. Berikutan dengan penyempurnaan Perjanjian 1995 tersebut, GISB memasukkan satu kaveat ke atas tanah-tanah tersebut. Tanah-tanah tersebut telah (kecuali berhubung dengan bahagian defendan kelima) berikutan itu didaftarkan atas nama GISB. Farlim mencabar penamatan Perjanjian-Perjanjian 1992 oleh benefisiari-benefisiari defendan dan penjualan tanah-tanah tersebut kemudiannya oleh mereka kepada GISB. Farlim memohon pengisytiharan bahawa Perjanjian-Perjanjian 1992 masih sah dan berkuatkuasa dan juga memohon relief sampingan, dan perintah selanjutnya bahawa GISB dan benefisiari-benefisiari defendan tidak diteruskan dan dihalang daripada memindahkan, menyerahhak, menggadaikan, memajak gadai atau memasuki atau melaksanakan sebarang urusan berhubung dengan bahagian-bahagian tidak berbahagi benefisiari-benefisiari defendan di dalam tanah-tanah tersebut ('SP 1995'). Selepas itu, Farlim telah memfailkan guaman ini melalui yang mana mereka telah memohon untuk mendapatkan satu injunksi bagi menghalang defendan-defendan pertama hingga ke-enam dan GISB daripada menyempurnakan, memindahkan, menyerahhak, menggadaikan dan menguruskan tanah-tanah tersebut sementara menantikan penyelesaian SP 1995. Dalam tindakan ini Farlim juga memohon untuk mendapatkan perintah supaya pemindahan tanah-tanah tersebut kepada GISB diketepikan dan juga memohon untuk mendapatkan perintah perlaksanaan spesifik Perjanjian-Perjanjian 1992 dengan menegaskan bahawa defendan-defendan pertama hingga ke-enam telah memungkiri Perjanjian-Perjanjian 1992 dan bahawa Perjanjian-Perjanjian 1992 masih tidak dibatalkan tetapi masih berkekalan dan boleh dilaksanakan. Farlim telah mendapatkan injunksi ex parte dalam tindakan ini. Atas rayuan kepada Mahkamah Rayuan, injunksi ini telah diselesaikan oleh Mahkamah Rayuan sepertimana yang dilaporkan di dalam *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd* [1997] 3 MLJ 90. GISB dan defendan-defendan telah memohon untuk membatalkan guaman semasa, tetapi permohonan mereka telah ditolak oleh penolong kanan pendaftar. Mereka telah merayu. Isu utama untuk penentuan dalam

A B C D E F G H I

A mahkamah semasa adalah sama ada keputusan Mahkamah Persekutuan dan keputusan-keputusan Mahkamah Rayuan telah memutuskan dengan tepatnya perkara yang menjadi isu dalam guaman semasa ini, iaitu keesahan Perjanjian-Perjanjian 1992.

B **Diputuskan**, membenarkan rayuan tersebut:

(1) Selepas meneliti dengan penuh ketelitian isu-isu yang penting dan kolateral dalam penghakiman Mahkamah Persekutuan dan penghakiman Mahkamah Rayuan, mahkamah berpendapat, bahawa berhubung dengan penghakiman Mahkamah
C Persekutuan, dalam memutuskan isu sama ada Farlim adalah pihak yang terkilan di dalam lingkungan maksud s 327 KTN dan sama ada mereka boleh memohon untuk pembatalan kaveat tersebut, Mahkamah Persekutuan telah meneliti isu keesahan Perjanjian-Perjanjian 1992. Keupayaan benefisiari-benefisiari tersebut memasuki Perjanjian-Perjanjian jual beli telah diambil
D sebagai satu isu yang penting oleh Mahkamah Persekutuan. Mahkamah Persekutuan kemudiannya membuat satu keputusan yang tidak meragukan bahawa Perjanjian-Perjanjian 1992 tidak boleh dikuatkuasakan dan batal kerana benefisiari-benefisiari tidak dapat memberi persetujuan untuk menjual apa yang tidak mereka punyai. Pengumuman oleh Mahkamah Persekutuan
E membentuk satu duluan mengikat yang membentuk isu estopel yang menghalang Farlim daripada mempersoalkan keesahan Perjanjian-Perjanjian 1992 tersebut dan mengikat kesemua pihak ke atas siapa ianya diumumkan. Adalah diakui bahawa defendan-defendan pertama hingga ke-enam bukannya merupakan pihak-
F pihak kepada kes Mahkamah Persekutuan. Walau bagaimanapun perkara pokok kes Mahkamah Persekutuan dan kes semasa adalah sama dan plaintif telah dengan itu terikat oleh keputusan Mahkamah Persekutuan (lihat ms 184A–E).

(2) Begitu juga, penghakiman Mahkamah Rayuan dalam menyelesaikan injunksi tersebut semestinya ditafsirkan sebagai
G telah mempertimbangkan persoalan sama ada isu-isu yang dibangkitkan iaitu sama ada Perjanjian-Perjanjian 1992 adalah sah dan sama ada Perjanjian-Perjanjian 1992 tersebut telah ditamatkan dengan sah membentuk persoalan serius yang harus dibicarakan. Perjanjian-perjanjian jualbeli tersebut antara
H defendan-defendan benefisiari dan GISB masing-masingnya telah dibincangkan dengan jelasnya dalam penghakiman Mahkamah Rayuan. Dengan menyelesaikan injunksi tersebut Mahkamah rayuan dengan jelasnya mendapati bahawa tidak terdapat isu untuk dibicarakan (lihat ms 184E–G).

(3) Kes ini adalah suatu penyalahgunaan proses mahkamah dan
I Farlim haruslah dihalang daripada membangkitkan semula perkara sama yang telah dihakimi akhirnya oleh Mahkamah Persekutuan dan Mahkamah Rayuan. Pengumuman-

Perjanjian 1992 adalah muktamad. (lihat ms 184H–I)] A

Notes

For cases on estoppel, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras5129–5133. B

Cases referred to

Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188 (refd)
Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors [1996] 2 MLJ 206 (refd) C
Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd [1997] 3 MLJ 90 (refd)
Marble Terrazzo Industries Sdn Bhd v Anggaran Enterprise Sdn Bhd & Ors [1991] 1 MLJ 253 (refd)
Oh Phaik Lin & Ors v Choong Lye Hock Estate Sdn Bhd [1986] 1 MLJ 317 (refd) D

Legislation referred to

National Land Code s 327
Rules of the High Court 1980 O 18 r 19
Specific Relief Act 1950 s 20(1)(g) E

Mahinder Singh Dulku (*Mahinder Singh Dulku*) for the plaintiff.
K Kirubakaran (*Cheong & Oon*) for the defendants.

Zaleha Zahari J: The authorities lay down that it is only in plain and obvious cases that the court should exercise its power of striking out. After careful consideration of the facts and the submissions of the respective counsels in this case, I hold that this case warrants the exercise of the striking gout power conferred on this court by O 18 r 19 of the Rules of the High Court 1980, and/or under the inherent jurisdiction of the court order and was of the considered opinion that the senior assistant registrar (SAR) had erred in dismissing the two striking out applications filed which was the subject matter of the appeals before me, ie that filed by Gerak Indera Sdn Bhd ('GISB') on 5 May 1997 (encl (27)), as well as that filed by the first, second, fourth to sixth defendant on 27 July 1997 (encl (34)) on 26 August 1998. F G H

I was of the considered opinion that both counsels acting for the appellants in their respective appeal before me were correct in their submissions in stating that the issue raised in this suit had been adjudicated by two earlier court decisions and that the principle of res judicata and issue estoppel applies. In these circumstances, GISB's appeal (encl (53)) as well as that of the first, second, third to sixth defendant (encl (54)) against the SAR's decision was accordingly allowed with costs. The full reasoning for arriving at these conclusions are as follows: I

A *Background*

The background facts go back many years and have been the subject of much litigation.

In 1949, the lands in issue, Grant First Grade Nos 4661 and 5650 for Lot No 1457 and 1835 Mukim 13, North East District Pulau Pinang, B commonly known as the Ayer Itam Estate (hereinafter referred to as 'the said lands') were registered in the name of Choong Lye Hock Estate Sdn Bhd ('CLHE') as proprietor. It was then held, as to 25% of the said lands, for itself, and in respect of the balance 75%, for estate of the deceased Chor Bah Say who died intestate on 9 November 1949 ('the deceased').

C In the events that had transpired only two of the beneficiaries, ie Chor Phaik Har and Chor Phaik Sim are the remaining direct beneficiaries of the deceased's estate. The majority of the deceased beneficiaries have died resulting in their estate (ie the first to sixth defendants in this case) becoming the beneficiaries of the deceased's estate, who, as beneficiaries of the deceased, together with Chor Phaik Har and Chor Phaik Sim, were D accordingly entitled to $^3/_4$ undivided share of the deceased's estate.

In 1991, Farlim was desirous of purchasing the said lands from all of the beneficiaries of the deceased estate. Chor Phaik Har and Chor Phaik Sim however refused to execute the sale and purchase agreement with Farlim and on 26 October 1991 filed a caveat against the whole of the said E lands.

On the part of CHLE and the other beneficiaries, on 23 January 1992, two sale and purchase agreements ('the 1992 Agreements') were executed between the CHLE and all but two of the beneficiaries (ie Chor Phaik Har and Chor Phaik Sim) of estate of the deceased, on the one part as vendors, F and Farlim as purchasers, whereby the former agreed to sell the said lands to the latter for RM 32,006,000.

Following the execution of these 1992 Agreements, on 17 March 1992, Farlim, applied to remove the caveat lodged by the two beneficiaries, Chor Phaik Har and Chor Phaik Sim, who declined to sign the sale and purchase agreement pursuant to s 327 of the National Land Code ('the NLC') vide G Penang High Court 24–201–92. This application was supported by an affidavit of Lim Yoke Kwai, Farlim's Executive Director. He deposed that Farlim, as purchasers of the said lands and by virtue of the 1992 Agreements entered into between all but two of the beneficiaries, were 'persons aggrieved' within the meaning of s 327 of the NLC and had the H locus standi to apply for the removal of the caveat lodged by Chor Phaik Har and Chor Phaik Sim.

Farlim's application was allowed by Vincent Ng J on 18 June 1993. Chor Phaik Har lodged an appeal against Vincent Ng J's decision vide Federal Court Civil Appeal No 02–333–93. The Federal Court allowed Chor Phaik Har's appeal vide judgment delivered by his Lordship I Mohamed Dzaiddin FJ (as his Lordship then was) as reported in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188. A detailed examination of this decision will be dealt with subsequently in this judgment.

On 12 April 1994, vide Penang High Court OS 24–326–94, CHLE sought for an order terminating the trust of the landed properties of the estate of Chor Bah Say and to transfer the said lands in proportion of the respective undivided share to the respective beneficiaries. This application was allowed by Vincent Ng J on 19 May 1995 which, on appeal, was affirmed by the Court of Appeal on 1 April 1996 (see *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206). A B

Subsequent to these judgments, the said lands have since been transferred to the names of the respective beneficiaries in proportion to their respective shares.

On 11 January 1995, CLHE and the beneficiaries who executed the 1992 Agreements terminated the 1992 Agreements allegedly on the ground of Farlim's failure to furnish the bank guarantees stipulated therein. C

Thereafter, on 21 March 1995, the first to sixth defendant entered into a sale and purchase agreement with the seventh defendant, GISB, ('the 1995 Agreement') in respect of their respective undivided share of the said lands. According to GISB, prior to and at the time of signing the 1995 Agreement with the first to sixth defendant, they had conducted a search at the land office which revealed that Farlim had not entered any private caveat on the said lands. Following the execution of the 1995 Agreement, ie on 17 April 1996, GISB entered a caveat on the said lands. The said lands have (except in respect of the fifth defendant share) subsequently been registered in the name of GISB. According to GISB they have, since paid the purchase price to all of the other defendants (except in respect of the fifth defendant's share). The memorandum of transfer has also been registered. D E

On 8 May 1995, Farlim challenged the termination of the 1992 Agreement by the defendant beneficiaries and the subsequent sale of the said lands by them to GISB vide Penang High Court OS No 24–365–96 ('the 1995 OS'). By this 1995 OS, Farlim sought for a declaration that the 1992 Agreements were still valid and subsisting as well as for other consequential relief, and for a further order that the GISB and the defendant beneficiaries be injuncted and restrained from transferring, assigning, charging, leasing or entering into or effecting any dealing in respect of the defendant beneficiaries undivided share in the said lands. F G

Thereafter, about one year four months later, on 27 September 1996, Farlim filed this suit in the Pulau Pinang High Court Civil Suit No 22–307–1996 (hereinafter referred to as 'this action'), by which suit they sought for an injunction to restrain the first to sixth defendants and GISB from executing, transferring, assigning, charging and dealing with the said lands pending the disposal of the 1995 OS. In this action, Farlim also sought for an order that the transfer of the said lands to GISB be set aside as well as for an order of specific performance of the two 1992 Agreements contending that the first to sixth defendants were in breach of the 1992 Agreements and that the 1992 Agreements had not been terminated but were still subsisting and capable of performance. H I

A Farlim obtained an ex parte injunction in this action on 3 October 1996, then filed encl (6) to be heard inter partes on 15 October 1996. GISB responded by filing an application on 11 October 1996 to set aside the ex parte injunction obtained by Farlim on 3 October 1996 (encl (11)) followed by another application filed on 30 October 1996. All of the other defendants (except for the third defendant) by summons in chambers filed on
B 14 October 1996 also applied for the setting aside of the ex parte injunction obtained by Farlim.

On 11 December 1996, Yaacob Ismail J allowed Farlim's application for an injunction and dismissed GISB's and the defendant beneficiaries' application to set aside the ex parte injunction. GISB and the defendant
C beneficiaries appealed vide Court of Appeal No P 02–771–96 and P 01–2–772–96.

On appeal to the Court of Appeal, this injunction was dissolved by the Court of Appeal as reported in *Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd* [1997] 3 MLJ 90.

D

The appellant counsels' submissions

I propose to deal with Mr Tan and Mr Kirubakaran's submission jointly as there were elements of overlapping although the defendant beneficiaries position and GISB were, admittedly, somewhat different.

E

The fact that Farlim was relying on the 1992 Agreements to challenge the transfer of the said lands from the beneficiaries to GISB was highlighted. GISB contended that they, the currently registered owner of the said lands, had an indefeasible title to the same.

F Both counsels in their respective submissions were of the view that the validity of the 1992 Agreements, which is the main issue in this suit, was also the issue before the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd.* According to both of the appellants' counsel, the validity of the 1992 Agreements and the capacity of the defendant beneficiaries to enter into such an agreement, were clearly the important issues before the Federal
G Court in determining the appeal before them. The attention of this court was especially drawn to pp 193 and 194 of the judgment of the Federal Court.

It was the appellants' counsel's submission that Mohamed Dzaiddin FCJ in delivering the decision of the Federal Court had examined and scrutinized the 1992 Agreements before arriving at the conclusion, that, the
H 1992 Agreements were invalid where it was held that that the beneficiaries who executed the 1992 Agreements could not have consented to sell what they did not have and further concluded that Farlim had no locus standi to apply to remove the caveat lodged by the beneficiaries of the deceased estate.

I Both of the appellants' counsel submitted that this court was bound by the ruling of the Federal Court, and that the 1992 Agreements were unenforceable and void. In this situation, GISB, as the current registered

owner of the said lands, had obtained an indefeasible title to the said lands which cannot now be challenged. A

It is argued that this court cannot grant an order for specific performance in the circumstances of this case, by reason of the fact that more than three years has lapsed. The court's attention is drawn to the fact that in this case, payment should have been effected within five years. Section 20(1)(g) of the Specific Relief Act 1950 and the case of *Marble Terrazzo Industries Sdn Bhd v Anggaran Enterprise Sdn Bhd & Ors* [1991] 1 MLJ 253, at p 254 are held as authority for this proposition. B

In these circumstances, both Mr Tan and Mr Kirubakaran submitted that this action instituted by Farlim was an abuse of the process of court and should accordingly be struck out. C

As to the contention by the respondent's counsel that the 1992 Agreements were agreements of a *spes successionis*, Mr Kirubakaran pointed out that para 5 of statement of claim makes no reference to a *spes successionis*. He pointed out that throughout the 1992 Agreements, as well as the prayers sought in the statement of claim, makes no mention of a *spes successionis*. He was of the view that the 1992 Agreements clearly were agreements for the sale of an *interest on land* and not that of a *spes successionis*. In further support of this point, Mr Kirubakaran pointed out that Schedule 'E' of the 1992 Agreements also makes reference to 'name of beneficial owner' and 'interest in the said lands.' D

The Court of Appeal's decision dissolving the injunction obtained by Farlim on 11 December 1996 vide encl (11) in this action, both the appellants' counsel submission was that in consideration of the appeal against Yaacob J's decision in allowing the injunction, the Court of Appeal had made a finding of fact that the 1992 Agreements had been terminated. According to the appellants' counsel, to allow Farlim to re-litigate this same issue is an abuse of the process of court as the principle of res judicata and issue estoppel applies. E F

In conclusion, both Mr Tan and Mr Kirubakaran urged this court to allow their respective appeal with costs as the plaintiff's cause of action cannot be sustained arising from the Federal Court judgment and order that the plaintiff's action be struck out with costs. G

The respondent counsel's submissions

Dato' Mahinder, the respondent counsel's, stressed on the importance for this court to ascertain whether the decision of the Federal Court and the Court of Appeal referred to by Mr Kirubakaran and Mr Tan touches on the validity of the 1992 Agreements. The issue before the Federal Court was, whether Farlim was a 'person aggrieved' within the meaning of s 327 of the NLC? The following question being whether Farlim had locus standi to apply for removal of the caveat? H

According to the respondent's counsel the Federal Court did not express any opinion regarding the validity of the Sale and Purchase Agreements between Farlim and the defendants in this case (who were not I

parties in that appeal). According to him all that the Federal Court did was to examine the 1992 Agreements for the sole purpose of determining whether the said agreements had clothed Farlim with the necessary legal status of 'aggrieved persons' under s 327 of the NLC.

In his submission, Dato' Mahinder accepts the legal proposition laid down by the Federal Court which is, that in 1992, as the beneficiaries interest in the said lands had not been registered into their respective names, the purported sale by the beneficiaries concerned, to Farlim conveyed no registrable interest in the land. Consequently, that Farlim was not entitled to remove the caveat entered by Chor Phaik Har and Chor Phaik Sim under s 327 of the NLC. Dato' Mahinder submitted that Farlim is not disputing these rulings of the Federal Court that the beneficiaries only had a *spes successionis* in the said lands.

He, however, was of the view that this has nothing to do with the issue in this action. According to Dato' Mahinder, the Federal Court judgment did not make a ruling that the beneficiaries were not entitled to execute the 1992 Agreements. According to him, the three recitals of the 1992 Agreements referring to the sale of the beneficiaries respective share of the land, can only mean the *spes successionis*.

Dato' Mahinder's submitted that cl 5 of the 1992 Agreements, when read with cl 5 (3), must be interpreted by this court to mean that, until all of the conditions specified in the 1992 Agreements were fulfilled, the obligation of Farlim, as purchaser, was suspended. That it was incumbent upon the beneficiaries to take the necessary steps to vest title in themselves which only happened on 19 May 1995 when Vincent Ng J issued the distribution order.

As to the Court of Appeal judgment referred to by the defendants' counsel, he submitted that it does not assist the defendants in their contentions. According to him, the Court of Appeal did not expressly hold that there was no serious issue to be tried or that the 1992 Agreements are not valid. He was of the view that if the Court of Appeal was of the view that the 1992 Agreements were not valid or that they had been validly terminated as alleged by the defendants, the Court of Appeal would not have gone into the question of the availability of the mechanism of the private caveat as a means of its registrable interest in the lands. According to Dato' Mahinder, it was premature to go into the question of the validity or otherwise of the 1992 Agreements at an interlocutory stage and refusal of the injunction does not, ipso facto, mean that there are no issues to be tried.

He, therefore, submitted that Farlim has a reasonable cause of action against the defendants and that its claim is not barred by res judicata and prayed that the respective appeals of the defendants be dismissed with costs.

The issue for determination

The principle issue for determination of this court is whether the Federal Court decision and the Court of Appeal decisions referred to by the

appellants' counsel had decided with precision the point in issue in this present suit, ie the validity of the 1992 Agreements. A

Findings

The issues for determination before the Federal Court are at p 192 of the judgment, which is, whether Vincent Ng J was right in holding that Farlim were 'persons aggrieved' within the meaning of s 327 of the NLC and whether Farlim could apply for the removal of the caveat entered by Chor Phaik Har? B

A perusal of the Federal Court judgment shows that it initially sets out the factual background. It then made reference to the 1992 Agreements between the CLHE, the executors and the trustees of the estate of the deceased on the one part as vendors, and Farlim as purchasers, whereby the former agreed to sell the said lands for RM32,006,000. The judgment then made reference to Chor Phaik Har and Chor Phaik Sim's refusal to execute the sale and purchase agreement and the lodgment of the caveat by these two beneficiaries against the whole of the said lands on 26 October 1991. C D

From here, the judgment then set out the findings of Vincent Ng J, followed by the submissions of counsels for the appellants and the respondents. The court notes that counsels submissions before the Federal Court were centered on whether, on the date of the execution of the 1992 Agreements, the beneficiaries of the deceased estate had the capacity to convey title of the said lands to Farlim. E

On the part of the counsel acting for the beneficiaries, it was argued that as the administration of the estate had not been completed at the date of execution of 1992 Agreements, the beneficiaries had no title or interest before the administration of the estate was completed and could not therefore have covenanted to convey the title of the said lands to Farlim. F

On the other hand, Farlim's counsel submitted that the interest of a beneficiary of an intestate's right were ascertained and that the beneficiaries could sell their rights in the estate.

On this issue, his Lordship Mohamed Dzaiddin FJ, after making reference to the views of several authors on this issue, ruled: G

> ... that in law a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

At p 196 of the judgment, Mohamed Dzaiddin FJ (as he was then) then considered the issue of whether the deceased estate had been fully administered at the date of execution of the said agreements. The case of *Oh Phaik Lin & Ors v Choong Lye Hock Estate Sdn Bhd* [1986] 1 MLJ 317 was referred to and his Lordship then concluded that there was no evidence that the administrators had wound up the estate. At para H & I, p 196 of the judgment, reference was also made to the preambles of the sale and purchase agreements and to sch B to the said agreements, and then at p 197 of the judgment held as follows: H I

> Having regard to the above observation and the circumstances of the whole case we are satisfied that at the date of execution of the sale agreements the administration of the estate of Chor Bah Say has not been completed. It follows that until his estate has been fully administered by the administrators and distribution made according to law, the beneficiaries have no interest or property in the estate of Chor Bah Say so as to give them any title to the lands. Here, we agree with counsel for the appellant that the beneficiaries of his estate, being vendors of the land under the sale agreements could not have covenanted to convey any tile to the respondents. In the result the respondents cannot rely on the sale agreements to justify their status as 'persons aggrieved under s 327 of the NLC. For the above reasons we are of the opinion that the respondents have not satisfied us that there are sufficient grounds in law or fact for treating them as persons claiming an interest in the lands as would, if it were established, make them aggrieved by the existence of a caveat (*Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 215).

The Federal Court then allowed Chor Phaik Har's appeal with costs and set aside Vincent J's decision dated 18 June 1993.

As for the decision of the Court of Appeal in Appeal No P 02–771–96, delivered by his Lordship Ahmad Fairuz JCA (as he then was) the submissions of counsels before the court of Appeal is at p 96 of the judgment. The judgement narrates the submission of counsel for the appellants and the respondent.

It was argued on behalf of the beneficiaries that the failure on the part of Farlim to comply with the terms of the agreement amounted to a repudiation of the 1992 Agreements and that the actions by the two beneficiaries who did not sign the sale agreements (ie Chor Phaik Sim & Chor Phaik Har) amounted to frustration of the 1992 Agreement and arising from this, the beneficiaries had duly terminated the agreements.

Highlighted was the fact that Farlim, although aware of the caveats entered by GISB, failed to take steps to remove the caveat for a period of 14 months and there being no explanation for the delay. It was further argued that in the circumstances of this case, damages was an appropriate remedy.

In its judgment, the Court of Appeal laid stress on Farlim's failure to invoke the mechanism of a private caveat as a means of protection of its interest in the said lands prior to 27 September 1996. The judgment also touched on the issue of delay in filing the application for injunction and no explanation being given for the delay. The ratio decidendi of the judgment reads as follows:

> Apa yang nyata di dalam rayuan-rayuan ini ialah kegagalan responden mengkaveatkan tanah-tanah berkenaan sebelum 27 September 1996. Apalah lagi cara untuk memasukkan kaveat persendirian adalah lebih mudah dan ringkas di bandingkan dengan cara mendapatkan injunksi ... Responden tidak langsung mengemukakan penjelasan mengapa mereka tidak memilih jalan yang lebih senang dengan mengkaveatkan tanah itu.

The Court of Appeal considered that Farlim's failure to remove the caveat enabled GISB to buy the said lands and considered this to be decisive of the matter.

After considering all of the aforesaid matters, the Court of Appeal concluded that the injunction should not have been granted and then went on to dissolve the injunction.

After carefully scrutinizing the fundamental and collateral issues in the judgment of the Federal Court and the judgment of the Court of Appeal, referred to by counsels in their respective submissions I am of the following opinion. As for the judgment of the Federal Court, in deciding the issue whether Farlim was a person aggrieved within the meaning of s 327 of the NLC and whether they could apply for the removal of a caveat, I am of the view that in deciding the issues before it, it did go into the issue of the validity of the 1992 Agreements. The capacity of the beneficiaries to enter into the sale and purchase agreements was taken as an important issue by the Federal Court. The Federal Court then made an unequivocal finding that, the beneficiary defendants did not have the legal capacity to sell all the rights, title and interest in the said lands to Farlim as the estate of Chor Bah Say remained unadministered and distributed. The 1992 Agreements were held to be unenforceable and void because the beneficiaries could not have consented to sell what they did not have. In my considered judgment, the pronouncement by the Federal Court constitutes a binding precedent constituting issue estoppel precluding Farlim from questioning the validity of the 1992 Agreements and is also binding on all parties upon whom they were pronounced. Admittedly, the 1 to 6 defendants were not parties to the Federal Court case. However, the subject matter of the Federal Court case and the instant case are the same and the plaintiff is therefore bound by the findings of the Federal Court.

Likewise, in respect of the Court of Appeal judgment in dissolving the injunction, I am of the considered opinion that the Court of Appeal in dissolving the injunction must necessarily be construed to have considered the question of whether the issues raised, ie whether 1992 Agreements were valid and whether the 1992 Agreements had been validly terminated, constitutes serious question to be tried. The respective sale and purchase agreements between the beneficiary defendants and GISB were clearly discussed in the Court of Appeal judgment. By dissolving the injunction the Court of Appeal clearly found that there were no issues to be tried.

This court is bound by both the Federal Court and the Court of Appeal judgments. Having carefully studied and perused the issues and judgements concerned, I am of the opinion that, although the prayers sought for in those cases were different, the subject matter under scrutiny in the appeals before the Federal Court and the Court of Appeal, were clearly the validity of the 1992 Agreements.

I therefore hold that to allow this case to proceed is an abuse of the process of court and Farlim is precluded from reagitating the same matter which has been finally adjudicated by the Federal Court and the Court of Appeal as their pronouncements on the issue of the validity of the 1992 Agreements is final and conclusive.

To conclude, the statement of claim discloses no cause of action against all of the defendants. The appeals in encl (53) and (54) were accordingly allowed and Farlim's action against all of the defendants are dismissed with costs.

Appeal allowed.

Reported by Peter Ling